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Supreme Court, U.S.
FILED
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

GALEN CLIFTON SHAWVER, #19789-057
FEDERAL CORRECTIONAL INSTITUTE BECKLEY
POST OFFICE BOX 350, BEAVER, WEST VIRGINIA 25813
Petitioner

v.

HONORABLE J. MICHAEL LUTTIG
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT,

HONORABLE DIANA GRIBBON MOTZ
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT,

HONORABLE ALLYSON K. DUNCAN
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT, and

CLERK OF COURT JOHN S. BRUBAKER
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Respondents

PETITION FOR WRIT OF MANDAMUS

QUESTION PRESENTED FOR REVIEW

Whether A Writ Of Mandamus
Lies To Compel An Appellate Court To Hear
An Appeal Over Which It Has Jurisdiction.

PARTIES AND ADDRESSES

Petitioner,
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CITATIONS OF CASES	PAGE NUMBER
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2. "En Banc" Petition USCA-05-6727 United States Court of Appeals 4th Circuit	App. 3
3. See In the U. S. District Court for the Middle District of North Carolina. 1:00CR262-2	App. 5

PETITION FOR ISSUANCE A WRIT OF MANDAMUS

Now comes Galen Clifton Shawver, hereafter referred to as "Petitioner", requesting the Court to issue a Mandamus to Respondents to correct errors within the record and take jurisdiction in accordance with their duties.

Petitioner respectfully requests the Court not hold him to the higher standards as a person professionally trained in the art of the law. Instead Petitioner asks the Court to construe his petition under the latitude delineated by the United States Supreme Court in *Haines v. Kerner, 404 US 519 (1972)* (Not holding pro se pleadings to the higher standards demanded of a professional practitioner of the law).

OPINIONS BELOW

The Petition for Rehearing and Rehearing en banc was denied by the United States Court of Appeals for the Fourth Circuit without an opinion on January 31, 2006 (App. 3). The initial decision of the United States Court of Appeal for the Fourth Circuit was in the form of an unpublished opinion on September 30, 2005 (No. 05-6727) (4th Circuit) (App. 1). The underlying judgment was announced on May 4, 2001, was filed on May 29, 2001 (App. 5).

Unpublished Opinion of
The United States Court of Appeals

For The Fourth Circuit
entered 9-30-2005 ..... App. 1

Order of
The United States Court of Appeals
For the Fourth Circuit
Re: Denying Petition for Rehearing and
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JURISDICTION

As provided: "Under the Judiciaries Act of 1789 § 13, the Supreme Court of the United States has power to issue writs of mandamus to any courts appointed or persons holding office under the United States." See *United States ex rel. Crawford v Addison,* 22 HOW 174, 16 L Ed 304. And as also provided within 28 USC 1651 (a) wherein it states;

"The Supreme Court and all Courts established by act of Congress may issue writs as necessary or appropriate in aid of their respective jurisdictions and agreeable to the uses and principles of law."

"Traditionally the writ of mandamus is used in the Federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. See *Allied Chemical Corp. v Daiflon, Inc.,* 449 US 33, 101 S Ct 188, 66 L Ed 2d 193.

"Extraordinary writs of mandamus under 28 USCS § 1651 are used in aid of appellate jurisdiction only to confine an inferior court to a lawful exercise of its prescribed authority, or to compel it to exercise its authority when it is its duty to do so; the movant must show that his right to the writ is clear and indisputable. See *Moses H. Cone Memorial Hospital v Mercury Const. Corp.*, 460 US 1, 103 S Ct 927, 74 L Ed 2d 765.

"Public officers may be compelled by

mandamus". See *Marbury V Madison, 1 Cranch* 137, 2 L Ed 60; see also 13 ALR Fed 145.

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

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28 USC § 1361 "action to compel an
officer of the United States to Perform
His Duty" ..... App. 34

28 USC § 1651 (a) "Writs" ..... App. 35

STATEMENT OF FACTS

1. Petitioner timely filed a 2255 Petition in the United States District Court for the Middle District of North Carolina January 7, 2004. (Entered.)

2. United States Magistrate Sharp filed and Clerk Entered a Recommendation and Order November 4, 2004. (Entered Same Day.)

3. Timely response filed and Entered whereby Petitioner objected to magistrate's Recommendation and proposed Order February 17, 2005. (Entered Same Day.)

4. Judgment and Order was adopted by the Honorable Judge Olsteen and Judgment and Order were signed on February 17, 2005 and filed Entered February 23, 2005. (Entered Four Days After Signing.)

5. Timely motion filed and Entered by Petitioner moving Court to reconsider the 2255 Petition and to also grant a new trial based upon newly discovered evidence and/or hold an evidentiary hearing March 14, 2005. (Entered Same Day.)

6. Order dated Apr 21, 2005 was signed and mailed to Petitioner by the Honorable Judge Olsteen denying and dismissing the motion to reconsider and motion to grant a new trial based on newly discovered evidence. Order was not entered. See line entry below

on Item No. 10. (Entered 61 Days After Receipt and Signing.)

7. Timely Notice. of Appeal filed and Entered by Petitioner on May 9, 2005. (Entered Same Day.)

8. Entire record certified and transmitted to the United States Fourth Circuit Court of Appeals. (Certified as complete and accurate), June 3, 2005. Without Order 4/21/2005. Motion still outstanding.

9. Scheduling Order issued by the Fourth Circuit Court of Appeals and Entered on May 26, 2005, setting time for briefs no later than June 20, 2005 and mailed to Petitioner.

10. Order issued and signed but not Entered on April 21, 2005. Now Entered on June 22, 2005. Sixty-one days **after** issuance.

11. Letter from Clerk informing Petitioner filing fee was not needed. Entered August 29, 2005, and Letter from Petitioner's sister remitting funds to pay filing fee. (Entered Same Day.)

12. Order issued and Entered dismissing appeal and unpublished opinion Entered stating appeal not timely filed and Court lacked jurisdiction. Entered September 30, 2005. (Entered Same Day.)

13. Letter sent from Petitioner to United

States Fourth Circuit Court of Appeals Clerk Patricia O'Connor to inquire on missing Order April 21, 2005 and Docket Report. Also included certified copies of Order certified by District Court Clerk. (Entered Same Day.)

14. Letter sent from Petitioner to United States Court of Appeals Clerk Patricia O'Connor requesting corrections of the errors contained in Certified Record to avoid unnecessary filing of "en banc" motion to re-review the Record and consider the missing order and to find that appeal was timely made. Entered . Letter included Certified Court issued Order and Certified Docket Report. Letter sent October 04, 2005. (Entered Same Day.)

15. Letter sent to Petitioner from United States Court of Appeals Clerk Patricia O'Connor acknowledging receipt of Petitioner's letter and attaching instructions for filing an "en banc" petition. (Entered Same Day.)

16. Petitioner timely files "en banc" petition. Entered November 14, 2005. (Entered Same Day.)

17. Letter including remaining exhibits Entered sent to Fourth Circuit Court of Appeals Clerk Patricia O'Connor. (Entered Same Day.)

18. Letter and response by Petitioner mailed to Chief Judge Wilkins for the Fourth Circuit Court of Appeals seeking his assistance on correcting erroneous

ruling and to correct erroneous Certified Record transmitted to the United States Fourth Circuit Court of Appeals. Letter Petition Entered.

19. Order Entered denying motion to hold hearing "en banc" February 1, 2006. Order stated reason for denial because no Judge asked for a poll. (Entered Same Day.)

20. Letter sent by Petitioner to Chief Judge Wilkins asking his assistance in correcting error in ruling and erroneous record transmitted to the United States Fourth Circuit Court of Appeals. (Entered Same Day.)

21. Letter sent to Petitioner from the United States Court of appeals Clerk informing Petitioner to file Writ of Cert. and including various forms of the Supreme Court Rules.

Question Presented

Whether a Writ of Mandamus lies to compel an Appellate Court to hear an appeal over which it has jurisdiction.

Reasons for Granting the Writ

It is readily apparent from review of the facts set forth that the Appellate Court's dismissal of the Petitioner's appeal and its subsequent refusal to consider his "en banc" Motion were as a result of a calamity of errors.

Upon the District Court's denial of his 2255 Petition, Petitioner timely filed a Motion to Reconsider. That motion stayed the period for filing an Appeal to the United States Court of Appeals (Rule 58 et seq., Rule 4 et seq., governing Rules of Appellate Procedure). Indeed, it is urged that had the Petitioner attempted to appeal while the motion to Reconsider was pending, same would have been held to be "premature". Instead, Petitioner only filed his Appeal after receiving, through regular course of mail, a copy of the order denying his Motion to Reconsider. (Exhibit Order dated 4/21/2005). The calamity begins with the District Court's failure to enter that order into the record until June 22, 2005 (nine weeks after the order was issued). Thus, the Docket Report before the Appellate Court was incomplete and inaccurate leading to its conclusions of lack of jurisdiction. (Record was certified as accurate and complete June 3, 2005.)

The calamity continues when the Appellate

Court fails to consider the lack of completeness and accuracy of the record upon Petitioner's "en banc" Motion by failing to consider it based upon "no poll being requested". The Motion clearly called attention to the inaccurate Record by exhibiting to the Court the failures of the Lower Court to "Timely" file the "Key" order concerning the Motion to Reconsider. Yet the Court still failed to take jurisdiction of a case properly before it.

An Appellate Court has a duty to consider the Appeal on any case over which it has jurisdiction.

The peremptory Writ of Mandamus has traditionally been used in the Federal Courts "only to confine an inferior Court to a lawful exercise of its jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v Evaporated Milk Assn.* 319 US 21, 26, 87 L Ed 1185, 1190, 63 S Ct 938 (1943). The courts have never confined themselves to arbitrary and technical definitions of "Jurisdiction." It is clear that only exceptional circumstances amounting to a "usurpation of power" will justify the invocation of this extraordinary remedy. *DeBeers Consol. Mines, Ltd. v United States*, 325 US 212m 217, 89 L Ed 1566, 1572, 65 S Ct 1130 (1945). And where as here a District Court has displayed a persistent disregard of the Rules of Civil Procedure promulgated by this Court. *La Buy v Howes Leather Co.*, 352 US 249, 1 L Ed 2d 290, 77 S Ct 309 (1957): See also *McCullough v Cosgrove* 309 US 634, 84 L Ed 992, 60 S Ct 703 (1940); *Los Angeles Brush Mfg. Corp. v James*, 272 US 701, 706, 707, 71 L Ed 481, 484, 47 S Ct 286 (1927) (Dictum).

The party seeking the Mandamus has "the burden of showing that its right of issuance of the Writ is clear and indisputable". *Bankers Life & Cas. Co. v Holland*, 346 US 379 384, 98 L Ed 106, 112, 74 5 Ct 145 (1953); See also *United States v Duell* 172 US 576, 582, 43 L Ed 559, 561, 19 S Ct 286 (1899).

Also, in cases where a final disposition has not been made, the Courts have been reluctant to engage in what is known as "piecemeal" litigation. The tone has been to wait until a final judgment and order has been made. See Judiciaries Act of 1789 § 21, 22, 25, 1 stat 73,83,8485; *Cobbledick v United States,* 309 US 323, 326, 84 L Ed 783, 785, 60 S Ct 540 (1940). *McLish v. Roff*, 141 US 661, 35 L Ed 893, 12 S Ct 118 (1891). This policy takes on added significance in criminal cases where the defendant is entitled to a speedy resolution of the charges against him. *Dibella v United States*, US 369 US, 121, 126, 7 L Ed 2d 614, 618, 82 S Ct 654 (1962).

The Writ of Mandamus has been invoked successfully where the action of the trial Court totally deprived the government of its right to initiate a prosecution. *ex-parte United States*, 287 US 241, 77 L Ed 283, 53 S Ct 129 (1932) and also where a Court overreached its judicial authority to deny the government rightful fruits of a valid conviction *ex-parte United States*, 242 US 27, 61 L Ed 129, 37 S Ct 72, LRA 1917 E 1178 (1916).

As in *Will v United States* the issuance of the

Writ being requested is not being sought as a punitive action but instead the writ would "serve as a vital corrective and didactic function." See *Will v United States* 389 US 90, 19 L Ed 2d 305, 88 S Ct 269 page 317 16, 17. In the case of Will v United States the Writ was sought and issued from the Appellate Court. The United States Supreme Court reversed, stating the record was incomplete to support the issuance. In this case subjudice it is submitted that it is well developed to show that the Court Judiciaries (1) have a duty to hear an Appeal which is properly placed before the Court (2) the Court has Appellate Court jurisdiction (3) have shown their propensity to ignore the facts as developed by the Record and the Court's Rules. Petitioner's persistence is shown by his repeated attempts to show the Court where its error was made. In effect, this is having the Petitioner bear the burden of correcting a Record and correcting errors that Petitioner has no control over whatsoever. Instead, Petitioner is at court's mercy.

There is no question that both Courts and the District Court Clerk has each shared responsibility for the calamity of errors contributing to the erroneous decisions. However, the Petitioner had absolutely no control over the record nor the entry of the "Order." The Petitioner had no control over the accuracy or the completeness of the court's records either. Instead the Petitioner has repeatedly tried to get the Records corrected oftentimes before the errors occurred. Petitioner has been only rebuffed in his efforts.

If the Mandamus issues, the Appellate Court

will be able to get to the merits of the Petitioner's Appeal. It certainly goes without saying that it is a sad day for a petitioner to lose his ability to be heard on appeal due to no fault of his doing but instead as a result of an erroneous and incomplete Record. That record is the reason being relied upon to deny the appeal for lack of Jurisdiction.

Where in this case an inferior Court, a Writ of Error would not be appropriate but instead a Writ of Mandamus can be issued for "refusal of an inferior Court to hear and decide a case, the remedy is by mandamus to compel the Court to entertain and decide the case and not by writ of error". See *In re Bradstreet* 7 Pet 634, 8 L Ed 810 and also *In re Newman* 14 Wall 152, 20 L Ed 877. See also *Crawford v. Haller* (*Harrington v. Holler*) 111 US 796, 4 S Ct. 697, 28 L ED 602. However, it must be noted there is somewhat stronger indications shown in *In re Parker* the Supreme Court stated "The writ of mandamus may be issued where an inferior court refuses to take jurisdiction when by law it ought to do so, or where having obtained jurisdiction it refuses to proceed in its own exercise". See *In re Parker* 120 US 737, 7 S Ct 767 and *In re Parker*, 131 US 221, 9 S Ct 123.

"Inasmuch as a writ of mandamus cannot be used to perform the office an appeal or writ of error to review the judicial action of an inferior court, a final judgment of the circuit court of the United States for the defendant upon a plea to the jurisdiction cannot be reviewed by such writ, but if the court, after sufficient service on the defendant, erroneously declines to take

jurisdiction of the case or to enter judgment therein, a writ of mandamus lies to compel it to proceed to a determination of the case, except where the authority to issue the writ has been taken away by statute." *Re Grossmayer*, 177 US 48, 20 S Ct 535, 44 L Ed 665. For further clarification, See *Ex-parte Fahey* 332 US 258, 260, 91 L Ed 2041, 2043 67 S Ct 1558 (1947) wherein it states, "Mandamus should be resorted only where appeal is clearly inadequate."

The Supreme Court has power to order a mandamus requiring the court of claims to hear, entertain, and decide a motion for a new trial, and also a motion to correct the records of that court, where the court of claims has wrongfully denied the motions on the ground that it had no jurisdiction. See *Re Roberts,* 15 Wall 384, 21 L Ed 131. Also "the Supreme Court may issue a mandamus to a circuit Court to proceed to judgment." See *Ex Parte Many*, 14 How 24, 14 L Ed 311.

"The Supreme Court has power to issue writs of mandamus to any courts appointed under the authority of the United States, where such court, having jurisdiction, refuses to hear and decide a case, or where, having heard, it refuses to render judgment or enter a decree. But the writ will not be issued in any case if the party aggrieved may have a remedy by writ of error or appeal." See *Re Newman*, 14 Wall 151, 20 L Ed 877. "The Supreme Court of the United States in the exercise of its appellate jurisdiction, may issue mandamus in a proper case to direct a subordinate Federal court to decide a pending case." *Knickerbocker Ins. Co. v.*

Comstock, 16 Wall 258, 21 L Ed 493.

"The remedy by mandamus has been very much extended in modern times, and now is an established remedy to oblige inferior courts and magistrates to do that justice which they are in justice or by virtue of their office bound to do. It is the proper remedy when the case presented is outside of the exercise of judicial discretion, and outside the jurisdiction of the court or officers to which or to whom the writ is addressed." *Re Virginia (Virginia v. Rives)* 100 US 313, 25 L Ed 667.

"Mandamus lies to compel the United States circuit court to take jurisdiction of a suit which it has wrongly dismissed for lack of jurisdiction." *Re Hohorst*, 150 US 653, 14 S Ct 221.

"The Supreme Court may issue mandamus to the Court of Claims commanding it to hear and decide a motion for new trial and to stay judgment, after its judgment has been affirmed by this court." *Re United States*, 16 Wall 699, 21 L Ed 507.

"The United States Supreme Court will not by writ of mandamus order an inferior tribunal to render judgment for or against either party though it may, in a proper case, order such court to proceed to judgment, but to justify even this a plain case of refusing to proceed in the inferior court should be made out." *Life & Ins. Co. v. Adams*, 9 Pet 573, 9 L Ed 234.

Mandamus may be used to compel an inferior

court to decide upon a matter within its jurisdiction, but not to control its decision." See *Re Flippin*, 94 US 348, 24 L Ed 194. "Mandamus lies to compel a court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction. See *Re Brown*, 116 US 401, 6 S Ct 587. "A proceeding by a mandamus is an action or suit brought in a court of justice, asserting a right, and is prosecuted according to the forms of judicial proceedings." See *Kendal v. United States ex rel Stokes* 12 Pet 524, 9 L Ed 1181.

"Statements in an alternative writ of mandamus stand admitted, if not denied by the return." See *United States ex rel Butz v. Muscatine* (*Butz v. Muscatine*) 8 Wall 875, 19 L Ed 490. "A party demurring to the rule for a writ of mandamus or to the return admits everything well pleaded in the rule or the return, as the case may be, and if the relator elects to proceed to hearing on the return without pleading to the same in any way, the matters therein alleged must be taken to be true so far as well pleaded." See *Re Newman*, 14 Wall 152, 20 L Ed 877." "The granting of a writ of mandamus is discretionary with the court. See *Union P. R. Co. v. Hall*, 91 US 343, 23 L Ed 428.

There is no other place for the defendant to get relief. There is no further act for the defendant to take to get the error corrected to show the court it has jurisdiction and should proceed to judgment. And to not do so denies him his rights. (Due Process)

The Clerk Of Court Has A Duty
To Keep Accurate And Complete
Records And To Accurately Certify
The Same To Courts Of Appeals.

Rule 79 (a) in the Rules of Civil Procedure states:

"The Clerk [shall] keep a book known as a "Civil Docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the judicial conference of the United States, and [Shall Enter] therein each Civil action to which these rules are applicable...[ALL] papers filed with the Clerk, [ALL] process issued, and returns thereon, [ALL] appearances, [Orders] verdicts and judgments [Shall] be [Entered chronologically] in the Civil Docket on the folio assigned to the action and [Shall] be marked with its file number. These entries[Shall] be brief but [Shall] show the nature of each paper filed or writ issued and the substance of each order or judgment of the Court and of the returns showing execution of process. The entry of an order or judgment [Shall] show the date the entry is made..."

And further in Rule 79 (b) it states:

"The clerk [Shall] keep in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the

judicial conference of the United States may prescribe, a correct copy of every Final Order, judgment or [appealable order], and [any other order] which the court may direct."

[Brackets and bolding added by the Petitioner for focus.]

The records being kept by a Clerk of Court are relied upon by many individuals, judiciaries, lawyers, other law clerks, Appellate Courts and Supreme Courts. A record which contains omissions or errors can upset the entire process. As in this matter the errors and omissions now shown set into motion a calamity of mistakes and rights lost.

There can be no dispute the Order of April 21, 2005 (App.) was not included within the "Docket Report" nor within the "Certified Record". There is no question that the order of April 21, 2005 (Appendix 1) was not entered until after the Record was sent to the United States Court of Appeals and the entry date was on June 22, 2005 (App.). There is no dispute the order was issued. There is no dispute the order has to be entered into the record before certifying to the Circuit Court. There is no question the Certified Record did contain errors and serious omissions.

The Petitioner had asked that the errors be corrected by both the Clerks. The Court of Appeals was asked to review the error and was told in advance of other errors.

The District Court Clerk only takes shared contributory negligence in that there was in the Docket Report an entry showing that a motion was still outstanding and not ruled upon according to the certified Record. That entry alone extends the deadline for filing a Notice of Appeal date by 150 days. The reason according to Rule 4 (4) (A) (i) and Rule 4 (4) (B) (i and ii), stating in sum if the order was not entered and the motion was not disposed of then the time to appeal is defined where entry in the Rules is defined as 150 days after last motion or activity. Rule 4 of the Rules of Appellant Procedure App. .

The Clerk's duty is to provide an accurate and correct record and that duty is without question. The "Certified Record" provided on June 3, 2005 (App.) is woefully inaccurate as demonstrated and articulated within the "en banc" petition where the Court failed to see the error as it was exhibited to the Court to see.

Among the conditions to the issuance of a writ of mandamus are that (1) The party seeking the issuance has no other adequate means to attain the relief he desires; (2) The party satisfies the burden of showing that his right to issuance is clear and indisputable; and (3) issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed. *Kerr v United States,* Dist. Court for Northern Dist. 426 US 394, 96 S Ct 2119, 48 L Ed 725.

A mandamus may issue when there is no discretion or judgment required of the person or party

on which the mandamus is directed. "A mandamus is granted only for ministerial acts in the performance of which no exercise of judgment or discretion is required. See *United States ex rel Carrick v Lamar* 116 US 423, 6 S Ct 424, 29 L Ed 677.

Going further, when a person has a duty to perform an act and does not perform the duty then a petition for a mandamus may be considered. That person may be compelled by the issuance of a mandamus when a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. See *Garfield v United States* 211 US 249, 29 S Ct 62, 53 L Ed 168. For further clarification, See *Cunningham v Macon & B. R. Co.* 109 US 446, 3 S Ct 292, 609, 27 L Ed 992.

And as is the case here, the subject concerns the enforcement of Rules which by law it is the duty of the United States Supreme Court to formulate and put into force, mandamus should issue to prevent such action thereunder as is so palpably improper as to place it beyond the scope of the rule involved. See *La Buy v Howes Leather Co.* 352 US 249, 77 S Ct 309, 1 L Ed 2d 290.

The Clerk of Court is described as the head clerk and has a described duty. "A ministerial duty is described as a duty the performance of which may, in proper cases, be required of the head, by mandamus, is

one in respect to which nothing is left to discretion. It is a simple definite duty, arising under conditions admitted or proved to exist and imposed by law. See *Kendal v United States ex rel Stokes*, 12 Pet 524, 9 L Ed 1181 and "If the law directs a public officer to perform an act in regard to which no discretion is permitted to him, and which upon the facts existing he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. See *Roberts v United States ex rel Valentine* 176 US 221, 205 S Ct 376, 44 L Ed 443. For further clarification, See *Cunningham v Macon & B. R. Co.* 109 US 446, 3 S Ct 292, 609, 27 L Ed 992.

Further as whether a mandamus may issue "Any person who will sustain personal injury by an officer's refusal to perform a plain official duty may have a mandamus to compel its performance. See *Board of Liquidation v McComb*, 92 US 531, 23 L Ed 623.

Finally, where no excuse may be given for not performing the act a peremptory writ of mandamus may issue as was the case in *Santa Fe County Comrs. v New Mexico ex rel Coler* 215 US 296, 30 S Ct 111, 54 L Ed 202 There can in this matter be no excuse for not performing the acts as described and requested to be done.

ARGUMENT

One year is ample time to give any District Court Clerk to correct a Certified record. The record has contributed to the calamity of errors. The clerk always has the ability to correct the courts records. The certified record has not been corrected nor has a corrected record been submitted to Petitioner and the Circuit Court as requested.

One year is ample time for a Circuit Court to correct its records and rulings made in error of the law, the court rules and the court records as shown to exist.

No question exists showing the record was not complete and was not accurate.

No question the certification was not accurate and could not be relied upon by the court to deny jurisdiction to hear the Appeal.

Given the time and the efforts by the Petitioner there is no question neither the District Court Clerk nor the Circuit Court is going to take the necessary steps to remove or correct the errors. Both courts it can be said have acted with refusals, either by silence or deliberate indifference of their respective duties to the detriment of the Petitioner.

When refusals are experienced as in this case it is submitted the petition for mandamus is supported.

For the refusal of an inferior court to hear and

decide a cause, the remedy is by mandamus to compel the court to entertain and decide the case, and not by writ of error. *In re Newman*, 14 Wall 152, 20 L Ed 877 and; See *In re Bradstreet* 7 Pet 634, 8 L Ed 810.

Further, mandamus is the only adequate mode of relief where an inferior tribunal refuses to get upon a subject brought properly before it. *Life & Ins. Co. v. Wilson*, 8 Pet 291, 8 L Ed 949.

The clerk of the circuit court verifies the certified order, the transcript and the motion ("en banc") was placed before the jurists on the panel. See Letter from Patricia O'Connor to the Petitioner. They each sat in silence and refused to speak or give the clerk law reason nor findings not forget the petitioner. Instead due to their silence, the clerk dismisses the Appeal ("en banc") petition. With the proof in hands the court refuses to speak. The Supreme Court in exercise of its appellate jurisdiction, may issue mandamus in a proper case to direct a subordinate federal court to decide a pending case. *Knickerbocker Ins. v. Comstock*, 16 Wall 258, 21 L Ed 493. See Footnote.1 for some of the distinguishing cases that set the circumstances for issuance.

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[1] "Distinguished in *Ex parte Hoard, 105 US 579, 26 L Ed 1177*, holding, after circuit court has denied a motion for an order remanding a cause to the state court, it cannot be compelled to remand by mandamus; *Babbitt v. Clark, 103 US 610, 26 L Ed 508*, holding, under Act of 1875, a writ of error is the proper mode for reviewing order of circuit court remanding an action at law removed from a state court; *Hill v Thompson, 94 US 323, 24 L Ed 194*, holding that Supreme Court cannot review action of

The Supreme Court has general powers to issue a writ of mandamus to an inferior court commanding it to take jurisdiction of a cause when it refuses to do so. See *In re Pennsylvania Co.* 137 US 451, 11 S Ct 141, 34 L Ed 738.

In that there are records that the court is using that contains errors, "The Supreme Court has power to order mandamus requiring the court of claims to hear, entertain and decide a motion for a new trial, and also a motion to correct the records of that court, where the court of claims has wrongfully denied the motions on grounds that it had no jurisdiction. See *In re Roberts,* 15 Wall 384, 21 L Ed 131. The Supreme court can go even further and additionally order a stay of judgment. The Supreme Court may issue a mandamus to the court of claims commanding it to hear and decide a motion for a new trial and to stay judgment, after its judgment has been affirmed by the court. See *In Re United States*, 16 Wall 699, 21 L Ed 507.

Mandamus has to compel the United States Circuit Court to take jurisdiction of a suit which it has wrongly dismissed for lack of jurisdiction. See *In re*

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circuit court in the exercise of its supervisory jurisdiction over an adjudication of bankruptcy by the District Court; dissenting opinion in *Cleveland Ins. Co. v. Globe Ins. Co. 98 US 379, 25 L Ed 205*, majority holding that Supreme Court cannot review action of circuit court in the exercise of its supervisory jurisdiction over as adjudication of bankruptcy by the District Court."

Hohorst, 150 US 653, 14 S Ct 221, 37 L Ed 1211 which is further distinguished in *Wonk v United States*, 267 US 184, 69 L Ed 565, 45 S Ct 255, and also see *In Re Grossmayer*, 177 US 48, 49, 50, 44 L Ed 665, 20 S Ct 535.

The United States Supreme Court will not, by a writ of mandamus, order an inferior [court] tribunal to render judgment for or against either party though it may, in a proper case, order such court to proceed to judgment, but to justify even this a plain case of refusing the proceed in the inferior court should be made out. See *Life & Ins. Co. v Adams*, 9 Pet 573, 9 L Ed 234.

Petitioner is not asking for a review of an interlocutory order for it is settled "A writ of mandamus cannot be granted by the supreme court to receive a ruling or interlocutory order made in the progress of a cause." See *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 US 372, 13 S Ct 758, 37 L Ed 486.

Petitioner realizes the issuance of mandamus is a discretionary action and there is no right to the issuance excepting in an extraordinary case.

It is submitted this case fits the requirements and sets on all fours with the law, powers of the Supreme Court to issue, and will serve a vital didactic purpose in aiding appellate court to take jurisdiction of a matter presented before it. With the "plain errors" at both the District Court level by the District Court Clerk

and the Circuit Court errors it is respectively submitted relief to be granted and any other appropriate relief deemed appropriate by the Court.

CONCLUSION

For the reasons set forth and duly supported by applicable case law, a writ of mandamus should issue:

(a) to compel the District Court Clerk to correct errors within the record and recertify to Fourth Circuit Court of Appeals.

(b) to compel the Fourth Circuit Court panel to take jurisdiction and hear Petitioner's Appeal as a matter of right and as their judicial duty.

The petition for writ of mandamus should be granted.

It should be noted that the financial support of the investors and my family caused this petition filing to be possible.

Respectfully submitted,

Galen Clifton Shawver
Date: _____, 2007

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 05-6727

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

GALEN CLIFTON SHAWVER,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. William L. Osteen, District Judge. (CR-00-262; CA-04-36-1)

Submitted: September 27, 2005 Decided: September 30, 2005

Before LUTTIG, MOTZ, and DUNCAN, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Galen Clifton Shawver, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Galen Clifton Shawver seeks to appeal the district court's order denying his 28 U.S.C. § 2255 (2000) motion. We dismiss the appeal for lack of jurisdiction because the notice of appeal was not timely filed.

When the United States or its officer or agency is a party, the notice of appeal must be filed no more than sixty days after the entry of the district court's final judgment or order, Fed. R. App. P. 4(a) (1) (B), unless the district court extends the appeal period under Fed. R. App. P. 4(a) (5) or reopens the appeal period under Fed. R. App. P. 4(a) (6). This appeal period is "mandatory and jurisdictional." Browder v. Director, Dept of Corrections, 434 U.S. 257, 264 (1978) (quoting United States v. Robinson, 361 U.S. 220, 229 (1960)).

The district court's order was entered on the docket on February 22, 2005. The notice of appeal was filed on May 8, 2005.* Because Shawver failed to file a timely notice of appeal or obtain an extension or reopening of the appeal period, we deny his motion to proceed in forma pauperis and dismiss the appeal.

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*We have given Shawver the benefit of Houston v. Lack, 487 U.S. 266 (1988), in determining the date in which he filed materials in the district court.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

January 31, 2006

No. 05-6727
CR-00-262
CA-04-36-1

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

GALEN CLIFTON SHAWVER

Defendant - Appellant

On Petition for Rehearing En Banc

The appellant petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Luttig, Judge Motz, and Judge Duncan.

For the Court,

/s/ Patricia S. Connor

CLERK

UNITED STATES DISTRICT COURT

Middle District of North Carolina

Entered on Docket R.55	JUDGMENT IN A CRIMINAL CASE
Dated May 29, 2001	(For Offenses Committed On or Other Government)
UNITED OF AMERICA	Case Number: 1:00CR262-2

GALEN CLIFTON SHAWVER

v.

Defendant's Attorney: David Freedman

THE DEFENDANT:

☐ pleased guilty to count(s)

☐ pleaded nolo contenders to count(s) _____ which was accepted by the court.

√ was found guilty on counts (s)
2,3,4,5,8,7,8,9.10.12,13.14,15,16,17,18,19. 20,21,22 and 24 are plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s
18:371, 1341 & 1343	Conspiracy Mail Fraud and Wire Fraud	08/01/2000	1
18:1958(h). 1957(a)	Conspiracy to engage in monetary transactions in criminally derived property	08/01/2000	2

18:1341 & 2	Mail Fraud	08/01/2000	3
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18:1341&2	Mail Fraud	12/12/1997	9
18:1341 & 2	Mail Fraud	01/12/1998	10
18:1343 52	Wire Fraud	03/30/1998	12
18:134I&2	Mail Fraud	03/31/1998	13
18:1343 & 2	Wire Fraud	03/31/1998	14
t8:1343&2	Wire Fraud	04/03/1998	15
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18:1957(a) & 2	Engaged In Monetary Transactions in Interstate commerce in criminally derived property	12/09/1997	17
18:19 & 2	Engaged in Monetary Transactions in Interstate commerce in criminally derived property	12/22/1997	18
18:1957(a) & 2	Engaged in Monetary Transactions in interstate commerce in criminally derived property.	01/22/1998	19
18:1957(a) & 2	Engaged in Monetary Transactions in interstate commerce in criminally derived property	03/21/1998	20 and 21
18:1957(a) & 2	Engaged in Monetary Transactions In Interstate commerce in criminally derived property	04/08/1996	22
18:1951(a) & 2	Engaged in Monetary Transactions In Interstate commerce in criminally derived property.	08/04/1998	24

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

√ Count 23 is dismissed on the motion of defendant without objection of the Government and Count 11 was dismissed on 11/16/2001 and the parties entered into a Stipulation of Criminal Forfeiture as to Count 25.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's SSN: 239-88-1546
Defendant's DOB: 06/04/1951

May 4, 2001
Date of Imposition of Judgment

Defendant's USM #: 19789057

Defendant's Residence Address:

613 Rockspring Road
High Point, N 27262
Defendant's Mailing Address:
(if different from residence address

/s/ William L. Osteen
United States District Judge

Date: 5/25/05

Filed: May 25, 2001

Entered on Docket R.55

Dated May 29, 2001

IMPRISONMENT

The defendant hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of One Hundred end Thirty-Two (132) months.

[Thirty-Two (32) months on Counts 1.3, 4, 5, 6, 7, 8, 9, 10,12,13, 14, 15, Counts to run concurrently, and One Hundred (100) months on Counts 2, 16, 17, 18, 19, 20, 21, 22 and 24. Counts run concurrently. The One Hundred (100) month sentence imposed on Counts 2, 16, 17, 18, 19, 20, 21, 22, and 24 shall run consecutively to the Thirty-Two (32) month sentence imposed under Counts 1,3,4,5, 8, 7, 8, 9, 10, 12. 13, 14, and 15]

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

☐ at _____ am/pm on _____

☐ as notified by the United States Marshal.

√ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

√ at 12:00 noon on 06/15/2001.
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____, with a certified copy of this judgment,

_____

BY _____

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of threw (3) years.

[Three (3) years on Counts l, 3, 4, 5, 6, 7, 8, 9, 10 and 12, 13,14, and 15, Counts to run concurrently, and Three (3) years on Counts 2, 16, 17, 18, 19, 20, 21, 22, and 24, Counts to run concurrently with Counts 1, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, and 15]

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

☐ The above drug testing condition is suspended based on the court determination that the defendant poses a low risk of future substance abuse. (Check, if applicable).

√ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this Judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling. training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to say change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall riot associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide any requested financial information to the probation officer.

The defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer.

The defendant shall not participate in any occupation while on supervised release which involves financial consultation investments or similar occupations by any other name including banking.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal penalties in accordance with the Schedule of Payments set forth on Sheet 5, Part B.

	Assessments		Fine	Restitution
Totals	$ 2,200.00	$	$	3,214,285.00

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO245C) will be entered after such determination.

√ The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3684(i) all non-federal victims must be paid in full prior to the United States receiving payment.

Name of Payee	**Total Amount of Loss	Amount of Restitution Amount	Priority Order or % Of Payment
Gwendolyn Dupree Adams	$104,000,00	$104,000.00	
John Anderson	$ 50,000.00	$ 50,000.00	
David Andrews	$140,000.00	$140,000 00	
David Augustine	S 20,000.00	$ 20,000.00	
Lynn Barber	$ 19,000.00	$ 19,000.00	
Linda Byrd	$50,000.00	$ 50,000.00	
Charles Cadwallader	$ 50,000.00	$ 50.000.00	
Elizabeth A. Chambos	$ 25,000.00	$ 25,000.00	
Ray Corriher	$ 50,000.00	$ 50,000.00	
Hewis W. Cross	$100.000.00	$100,000.00	
Kathryn Danley	$ 95,000.00	$ 95,000.00	
Jennifer K. Darnick	$ 25,000.00	$ 25,000.00	

Lee Ann Day	$ 15,000.00	$ 15,000.00
Mahesh Kumar Desai		
	$ 25,000.00	$ 25,000.00
Richard Dingwell	$ 20,000.00	$ 20,000.00
John Durham	$ 25,000.00	$ 25,000.00
Stephen C. Evans	$100,000.00	$100,000.00
Karsen Fakhoury	$ 50,000.00	$ 50,000.00
Roger L Firestein	$ 50,000.00	$ 50,000.00
Elizabeth Fleming Montes		
	$ 29,00000	$ 29,000.00
David R. Frank	$ 25,000.00	$ 25,000.00
Tony Geye	$ 25,000.00	$ 25,000.00
David Geyer	$ 25,000.00	$ 25,000.00
Susan Gryte	$ 30,000.00	$ 30,000.00
Jackson L Haverly, M.D.		
	$ 40,000.00	$ 40,000.00
Martin Horan	$ 50,000-00	$ 50,000.00
Lewis D. Hutchins	S 25,000.00	$ 25,000.00
Brian E. Johnson	$ 93,000.00	$ 93,000.00
James A. Jones	$111,625.00	$111,625.00
Kenneth L Kennedy	$ 25,000.00	$ 25,000.00
Kevin Kuntz	$ 50,000.00	$ 50,000.00
Cathy M. Linderman	$ 62,000.00	$ 62,000.00
Jane Chapman King	$ 56,250.00	$ 56,250.00
Mary Ann McGonagle		
	$99,910.00	$ 99,910.00
Sylvia Mock	$ 55,000.00	$ 55,000.00
Chad W. Neaville	$ 52,000.00	$ 52,000.00
Saverio R. Pellegrino	$ 74,000.00	$ 74,000.00
Bruce L Peters	$102,000.00	$102,000.00
Anthony Piccone	$ 50,000.00	$ 50,000.00
Delip P. Punitar	$ 25,000.00	$ 25,000.00
Craig A. Ragsdale	$85,000.00	$ 85,000.00
Terry W. Reed	$ 50,000.00	$ 50,000.00

Rick G. Roberts	$10,000.00	$ 70,000.00
Mary J. Ruwart	$ 25,000.00	$ 25,000.00
Raymond A. St. Laurent	$257,500.00	$261,500.00
Gregory W. Shaefer	$ 25,000.00	$ 25,000.00
William R. Shriver	$ 50,000.00	$ 50,000.00
Johnny R. Strigle	$220,000.00	$220,000.00
Roger B. Thomas	$ 32,000.00	$ 32,000.00
Warren W Udd	$ 57,000.00	$ 57,000.00
James Vannoy	$ 50,000.00	$ 50,000.00
Nancy A. Waters	530,000.00	$ 30.000.00
Karen Younce	$120,000.00	$120,000.00
Chris Kazana	$25,000.00	$ 25,000.00
Totals	$3,214,285.00	$3,214,285.00

☐ If applicable, restitution amount ordered pursuant to plea agreement $_____

☐ The defendant shall pay interest on any fine of more than $2,500. unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part 8. may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3812(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the
☐ fine and/or ☐ restitution

☐ the interest requirement for the
☐ fine and/or ☐ restitution is modified as follows:

**Findings for the total amount of losses are required under Chapters 109A, 110A, and 113A of Title 18, United States Code for offenses commuted on or after September 13, 1994 but before April 24, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. √ Lump sum payment of $2,200.00, balance 06/03/2001 and

☐ not later than or

√ In accord with ☐ C, √ D or ☐ E below; or

B. ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or ☐ E below; or

C. ☐ Payment in_____ (equal, weekly, monthly, quarterly) installments of $_____ over a period of_____ (e.g.. months or years), to commence _____ (e.g., 30 or 60 days) after the date of this Judgment; or

D.√ In the event the entire amount of criminal monetary penalties imposed is not paid upon release from imprisonment payment in monthly installments of

$1,000.00, to commence sixty (60) days after release from imprisonment to a term of supervision; and every thirty (30) days thereafter until paid in full.

E. ☐ Special Instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau or Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk of Court, United States District Court for the Middle District of North Carolina, P.O. Box 2706, Greensboro, NC 27402, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

√ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

Michael Cassidy; 1:00CR262-1; $3,214,285.00
Clyde Beverly; 1:00CR262-3; $1,796,180.00
Jerry Revalee; 1:00CR262-4; $3,183,285.00

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following: (1) assessment (2) restitution principal (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application I the presentence report.

OR

√ The court adopts the factual findings and guideline application in the presentence report except (see attachment. if necessary):

The court finds that all counts should be grouped and the multiple count adjustment in paragraphs 51 through 56 should not apply.
Court dismissed count 23.

Guideline Range Determined by the Court:

Total Offense Level:	31
Criminal History Category:	I
Imprisonment Range:	108 to 135 months

Supervised Release Range: 2 to 3 years on each count
Fine Range: $ 15,000.00 to $ 150,000.00

√ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ 3,214,285.00

☐ Discretionary restitution is not ordered, because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(a)(B)(ii) (or in offenses committed before April 24, 1996, pursuant to 18 U.S.C. § 3663(d))

☐ Restitution pursuant to the mandatory victim restitution provisions is not ordered in this Title 18 property offense, because the number of identifiable victims is so large as to make restitution impracticable, pursuant to 18 U.S.C. § 3863A(c)(3)(A).

☐ Restitution pursuant to the mandatory victim restitution provisions is not ordered in this Title 18 property offense, because determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process, pursuant to 18 U.S.C. § 3663A(c)(3)(B).

☐ For offenses committed on or after September 13, 1994 but before April 24, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A

of Title 18, restitution is not ordered, because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered, pursuant to U.S.C. § 3553(c), for the following reason(s):

STATEMENT OF REASONS

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

√ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

The defendant's multiple acts of obstruction.

OR

☐ The sentence departs from the guideline range;

☐ upon motion of the government, as a result of defendant's substantial assistance, or

☐ for the following specific reason(s):

Rule 4. Appeal as of Right — When Taken

(a) Appeal In a Civil Case.

(1) Time for Filing a Notice of Appeal.

"... (B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered...."

"(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order -- before the entry of the judgment or order -- is treated as filed on the date of and after the entry..."

"(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:..."

(B) "(i) If a party files a notice of appeal after the court announces or enters a judgment - but before it disposes of any motion listed in Rule 4(a)(4)(A) - the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered..."

(ii) "...from the entry of the order disposing of the last such remaining motion..."

Rule 58. Entry of Judgment

(a) Separate Document.

(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b);

(C) for attorney fees under Rule 54;

(D) for a new trial, or to alter or amend the judgment, under Rule 59; or

(E) for relief under Rule 60.

(2) Subject to Rule 54(b):

(A) unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign and enter the judgment when:

(i) the jury returns a general verdict,

(ii) the court awards only costs or a sum certain, or

(iii) the court denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or

(ii) the court grants other relief not described in Rule 58(a)(2).

(b) Time of Entry. Judgment is entered for purposes of these rules:

(1) if Rule 58(a)(1) does not require a separate document, when it is entered in the civil docket under Rule 79(a), and

(2) if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs:

(A) when it is set forth on a separate document, or

(B) when 150 days have run from entry in the civil docket under Rule 79(a).

(c) Cost or Fee Awards.

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

(d) Request for Entry. A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1).

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 79. Books and Records Kept By The Clerk and Entries Therein.

"(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) Civil Judgments and Orders. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to

or lien upon real or personal property, and any other order which the court may direct to be kept..."

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963.)

Rule 453. Oaths of justices and judges

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, _____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me god."

(June 25, 1948, c. 646, 62 Stat. 907; Dec. 1, 1990, Pub.L. 101-650, Title IV, § 404, 104 Stat. 5124.)

Rule 455. Disqualification of justice, judge, or magistrate judge.

"(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonable be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of the disputed evidentiary facts concerning the proceeding;..."

(3) "...or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;..."

"...(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

"...(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household..."

(June 25, 1948, c. 646, 62 Stat. 908; Dec. 5, 1974, Pub.L. 93-512, § 1, 88 Stat. 1609; Nov. 6, 1978, Pub.L. 95-598, Title II, §214(a), (b), 92 Stat. 2661; Nov. 19, 1988, Pub.L. 100-702, Title X, § 1007, 102 Stat. 4667; Dec. 1, 1990, Pub.L. 101-650, Title III, § 321, 104 Stat. 5117.)

§951. Oath of office of clerks and deputies

"...'I, _____, having been appointed _____, do solemnly swear (or affirm) that I will truly and faithfully enter and record all orders, decrees, judgments and proceedings of such court, and will faithfully and impartially discharge all other duties of my office according to the best of my abilities and understanding. So help me God.'"

(June 25, 1948, c. 646, 62 Stat. 925.)

§956. Powers and duties of clerks and deputies

The clerk of each court and his deputies and assistants shall exercise the powers and perform the duties assigned to them by the court.

(June 25, 1948, c. 646, 62 Stat. 926)

§1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. (Added Pub.L. 87-748, § 1(a), Oct. 5, 1962, 76 Stat. 744.)

§1651. Writs

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law..."

(June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, §90, 63 Stat. 102.)